IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 755.

IRA J. McCULLOUGH, *Petitioner*,

v.

KAMMERER CORPORATION, a corporation, and BAASH-ROSS TOOL COMPANY, a corporation, *Respondents*.

REPLY BRIEF FOR THE PETITIONER

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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It is unnecessary, in reply to the citation of cases by respondents, to point out that decisions which did not arise under Section 129 of the Judicial Code but under provisions quite different in purpose do not lend support to respondents' view of the meaning of Section 129. (Compare cases cited in Respondents' Brief, pp. 7-8.)

It is improper to draw an inference as to what the "object and policy" of Section 129 is by quoting language in *McLish* v. *Roff*, 141 U. S. 661 (Respondents' Brief, pp. 10-11). This case had nothing to do with Section 129 of the Judicial Code. It pertained to appeal of jurisdictional issues to this Court directly from the old circuit courts, district courts

and the United States Court in the Indian Territory. Nevertheless, from the *McLish* case, the respondents draw the conclusion that the "established object and policy" of Congress was to have "every matter in controversy in it decided by a single appeal." This is the language of the *McLish* decision. It would have been just as appropriate for the respondents to have cited *Catlin* v. *United States*, 324 U. S. 229, as did the majority below. Neither case has anything to do with the "object and policy" of Section 129 and serves only to confuse the issue presented.

Respondents' statement that Section 129 provided for a "single appeal" which is exhausted thirty days after entry of a decree final except for an accounting is question-begging. The point here is that under well-established law an issue of patent misuse, in the discretion of the court, may be raised at any stage in a case. The Court of Appeals, after remand from this Court, believed that it was appropriate to have the issue of patent misuse litigated in this case prior to the time that it might have been raised during the accounting. The District Court was of like view and entertained the matter, even to the point of offering both parties the opportunity to introduce any additional evidence that they thought necessary to resolve the question. Under these circumstances the case was finally disposed of, except for the accounting, only when the order of June 5, 1945 was entered. The proceeding, had, in effect, been reopened. The appeal was taken within thirty days from this order terminating the last phase of the proceeding prior to the accounting. Under these circumstances it clearly was within the policy of Section 129 to avoid the necessity of completing a long and expensive accounting prior to determination of the issue of patent misuse. Certainly there was nothing in the decision of this Court when the instant case was last before it which barred litigation of the issue of patent misuse below. As this Court has stated, in *Marconi Wireless Telegraph Co.* v. *United States*, 320 U. S. 1, 47, in the discretion of the trial court an issue of patent misuse

may be raised at any time, even during the accounting. The desire of this Court to have the issue raised and litigated below before passing on it itself, does not mean, it is respectfully submitted, that this Court in any sense intended to prevent the issue from being raised and litigated below.

The argument of respondents that the 1927 amendment to Section 129 permitted an appeal only from a "decree" which was final except for an accounting, and that in the instant case the June 5, 1945 decree or order was designated an "order," can be summarily answered. In the first place, such words are used interchangeably and the designation of a decision as an "order" rather than a "decree" would certainly have no legal consequences. To carry respondents' argument to its logical conclusion would mean that if a trial court always designated its judgments by the term "order," rather than "decree," Section 129 would be nullified since no appeal would be possible prior to the accounting. What the District Court did cannot be nullified by any attempt to split hairs over the designation of its decision as an "order," rather than a "decree." The effect of the legal decision is no different irrespective of the term used, and the right to an appeal is therefore unaffected. In *Commissioner* v. *Estate of Bedford*, 325 U. S. 283, this Court held that an "Order for Mandate" constituted a judgment, rather than a document entitled "Opinion." It was seriously urged that the latter was itself the judgment. It need hardly be added that if the title "Order for Mandate" did not prevent the instrument from being a judgment, a document entitled "Order" is not prevented from being a decree within the meaning of Section 129.

As to the merits, it is enough to say that the Solicitor General, when this case was last before this Court, filed a brief *amicus* supporting the petitioner's contention that there was patent misuse in the instant case. The nature of the license agreement itself, as an integrated document, establishes such misuse. The license agreement was in evidence and consequently petitioner did not feel it neces-

sary to take advantage of the opportunity offered by the District Court to introduce additional evidence. It may also be noted that the respondents likewise introduced no further evidence. The agreement of the parties that the record was sufficiently complete does not change the conclusion that the District Court tried the issue of patent misuse and even though additional testimony was not taken made new findings of fact and conclusions of law. Under these circumstances Judge Denman rightly concluded that the trial court had correctly followed the mandate of the Circuit Court of Appeals and had reopened the proceeding.

Respectfully submitted,

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